

## **EXHIBIT A**

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF DELAWARE  
3

4 IN RE ADAMS GOLF, INC. : CONSOLIDATED  
5 :  
6 SECURITIES LITIGATION : C.A. No. 99-371 KAJ  
7

8 Friday, August 11, 2006  
9

10 Oral deposition of R. ALAN MILLER, taken  
11 pursuant to notice, was held at the offices of AKIN,  
12 GUMP, STRAUSS, HAUER AND FELD, LLP, 590 Madison  
13 Avenue, 18th Floor, New York, New York 10022-2524  
14 commencing at 8:50 a.m. on the above date, before Beth  
15 A. Barkocy, Certified Shorthand Reporter and Notary  
Public.

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22 - - -  
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1 DEPOSITION SUPPORT INDEX  
 2  
 3  
 4 Direction to Witness Not to Answer  
 5 Page Line Page Line  
 6 (NONE)  
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 9 Request for Production of Documents  
 10 Page Line Page Line  
 11 (NONE)  
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 19 Questions Marked  
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 8 EXHIBITS  
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 10 EXHIBIT NUMBER DESCRIPTION PAGE MARKED  
 11 334 Expert Report of R. Alan Miller 5  
 12 335 Rebuttal Expert Report of R. Alan Miller 5  
 13 336 Expert Report of Christopher James 5  
 14 337 Rebuttal Expert Report of Christopher James 5  
 15 338 E-Mail from Allyson Terpsina dated 08/03/06 5  
 16 339 Chart Bates Stamped CMJ 0560 5  
 17 340 Chart Bates Stamped CMJ 0561 5  
 18 350 Fax dated 08/04/98 206  
 19 351 Mr. Miller's AMF Report 247  
 20 352 Document Bates Stamped MIL 00090-00115 266  
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1 (Deposition commences with  
 2 Mr. Collins not yet present.)  
 3 MR. BESSETTE: Let's mark these,  
 4 please.  
 5 (Exhibits-334 through 340 were  
 6 marked for identification.)  
 7  
 8 R. ALAN MILLER, having been first  
 9 duly sworn, was examined and testified as  
 10 follows:  
 11  
 12 EXAMINATION  
 13  
 14 MR. BESSETTE: Read and sign for the  
 15 witness.  
 16 MR. LEWIS: I'd like to make a very  
 17 brief statement, and that is that we agreed  
 18 to this sequencing of the depositions in  
 19 response to a request by the defendants that  
 20 depositions either take place in a different  
 21 order or take place simultaneously. It's our  
 22 view that in this case, because of the legal  
 23 allocation of the burden of proof, that  
 24 certain burdens are on Mr. James rather than  
 25 on Mr. Miller, and for that reason we have to

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1 in that field.

2 Q. How many courses, in total, involved  
3 statistics, either undergrad or graduate?

4 A. At least four, I believe. There was  
5 one statistics and one operations research undergrad  
6 that I can recall, and I believe one of each in  
7 graduate school that I can recall. Operations  
8 research is, in my view, primarily statistics in  
9 content.

10 Q. Any other statistics classes that  
11 you can recall?

12 A. No.

13 Q. Let me hand you what has been marked  
14 as Exhibits-334 and 335 (indicating). I trust you  
15 will recognize those as your report and then your  
16 rebuttal report, respectively; is that correct?

17 A. That's what they appear to be, yes;

18 yes.

19 Q. I want to talk a couple of minutes  
20 about your background. In Exhibit-334, your report,  
21 Paragraph 7, Page 4, you list some experience in the  
22 investment banking field?

23 A. Right.

24 Q. Philadelphia Investment Bank  
25 Company, can you describe for me what type of

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1 clients who were investigating that option at  
2 the time.

3 What I don't recall specifically,  
4 whether any more of those resulted in working  
5 on deals that were or would have been filed  
6 under the '33 Act, but there are two I can  
7 recall specifically that were like that.

8 BY MR. BESSETTE:

9 Q. Moving to Butcher and Singer, where  
10 you were from 1976 to 1980 -- again, I've told you  
11 I've read other testimony, I'm just trying to boil  
12 things down so we can get to the substance of this  
13 case.

14 A. Right.

15 Q. Tell me if this squares with your  
16 recollection, that you recall working on six to ten  
17 public offerings while at Butcher and Singer but can  
18 only specifically remember three.

19 MR. LEWIS: Objection to form and  
20 foundation.

21 BY MR. BESSETTE:

22 Q. Does that sound right?

23 A. It sounds like it might have been  
24 right at one point. Let me think a minute.

25 I've got three in mind where we were

Page 11

1 investment bank services that company provides?

2 A. That's been a corporate finance  
3 services firm. As a way to define which of --  
4 services which may appear in a more full service  
5 investment banking firm, we've provided those. We  
6 don't have a retail sales or securities sales arm or  
7 investment research, as that's commonly known, or  
8 those sorts of things. We've been a corporate finance  
9 provider, that is, service provider, not actually an  
10 investor or lender of capital.

11 Q. Howard and Company, where you  
12 indicate you worked from 1972 to 1976, is it correct  
13 you worked on only two offerings registered under the  
14 Security Act of 1933 while at Howard and Company?

15 MR. LEWIS: Object to the form and  
16 foundation.

17 THE WITNESS: That's a good  
18 question. There are two I can recall  
19 specifically, one which may not have been  
20 completed at the time, if I recall correctly.  
21 That might be correct.

22 One of the services we provided was  
23 advisory in nature to companies considering  
24 going public. In the course of that, I did a  
25 lot of research and we had quite a number of

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1 the lead or co-lead managing underwriter, actually,  
2 and there were a number of other deals of that type on  
3 which I worked where we were not either lead or  
4 co-lead or where we were not taking primary role in  
5 that function. I think that's probably an accurate  
6 number.

7 Q. Only one of those was an initial  
8 public offering of stock; is that your recollection?

9 MR. LEWIS: Objection to the form.

10 THE WITNESS: One of the three was  
11 an IPO of -- was actually stock and warrants,  
12 which made up a unit at the time.  
13 Technically, the offering was of units.

14 BY MR. BESSETTE:

15 Q. That's the one I'm thinking of.

16 A. Of the three, yes. Of the others, I  
17 do believe there were other IPOs in that list.

18 Q. Can you recall them as you sit here?

19 A. No, I just recall vaguely having  
20 some conversations within the firm of the type that  
21 would have more likely applied to an IPO than another  
22 type of an offering; no.

23 Q. Turning the page of Exhibit-334,  
24 your time at Philadelphia Capital Advisors, which was  
25 1980 to 1983, you didn't work on any public offerings

4 (Pages 10 to 13)

Page 14

1 while at Philadelphia Capital Advisors; is that right?  
 2 A. Certainly not as an underwriter, we  
 3 didn't perform that function there. I think there was  
 4 an advisory job that I did that involved an IPO where  
 5 we were basically consulting to a -- I don't know what  
 6 the right term would be -- to a party that was  
 7 associated with the issuer in one case.

8 We did do some other consulting work  
 9 for people considering public offerings at the time.  
 10 I just don't recall if they actually got to that point  
 11 while I was there or not.

12 Q. Is it correct that you have not  
 13 worked on drafting an IPO prospectus since 1980, give  
 14 or take, in that time frame?

15 A. Yeah, I think that's probably  
 16 correct.

17 Q. How many IPO transactions has your  
 18 company, which is -- strike that.

19 Philadelphia Investment Banking  
 20 Company, that's a company you founded in or about  
 21 1983?

22 A. Correct.

23 Q. Or I should say cofounded, right?

24 A. That's right.

25 Q. You're still involved with, I'll

Page 14

Page 16

1 Q. What would be the other segments, if  
 2 any?

3 A. For PIBC, none. That's basically  
 4 the way we look at the business.

5 Q. Of the 20 or 30 clients you can  
 6 recall as you sit here, and I'm not holding you to  
 7 that number but that range, how many of those are  
 8 receiving litigation or support services, that  
 9 segment?

10 A. Right; 20 or 25 of the 30, let's  
 11 say.

12 Q. How many, if any, are receiving  
 13 corporate finance services?

14 A. Five to ten.

15 Q. Are there some that are receiving  
 16 both?

17 A. There are some that have received  
 18 both at different points in time, but the reason the  
 19 numbers aren't clearer than that is that is the best I  
 20 can recall at the moment trying to estimate how many  
 21 clients we have in those categories.

22 Q. As you sit here, you believe there  
 23 are five to ten clients of PIBC that are currently  
 24 receiving corporate finance services?

25 A. Right.

Page 15

Page 17

1 call it, PIBC?

2 A. Yes.

3 Q. How many IPO transactions has PIBC  
 4 been involved in over the past, say, ten years?

5 MR. LEWIS: Objection to form.

6 THE WITNESS: In the corporate  
 7 finance role as we view it, probably none.

8 BY MR. BESSETTE:

9 Q. How many clients does PIBC have  
 10 currently?

11 A. That's hard to recall specifically,  
 12 in a sense, because some are at various levels of  
 13 activity, but probably -- my best estimate would  
 14 probably be 20 or 30 at this point. That's kind of a  
 15 squishy number.

16 Q. I understand. I'd like to sort of  
 17 break up in segments real fast just the services that  
 18 PIBC provides. I know you provide litigation and  
 19 support services; that's one segment, right?

20 A. Correct, that's the way we view it;  
 21 yes.

22 Q. Investment banking services, is that  
 23 another segment?

24 A. Sure. We call it corporate finance  
 25 services, but yes.

1 Q. What was the last M and A  
 2 transaction in which you were involved, sir?

3 MR. LEWIS: Objection to form.  
 4 THE WITNESS: The last one, I don't  
 5 believe I can discuss with you. I don't  
 6 believe that our retention has been  
 7 publicly...

8 BY MR. BESSETTE:

9 Q. I was looking for the timing, not  
 10 any of the details. Are you saying it's current?

11 A. Yes, last couple weeks.

12 Q. Prior to that one, when was your  
 13 last M and A transaction?

14 A. Probably ended about two months ago,  
 15 I think, or I think our work ended about two months  
 16 ago, maybe three months ago.

17 Q. The M and A transaction, that would  
 18 be subsumed in the corporate finance segment of the  
 19 business?

20 A. Yes.

21 Q. The litigation segment of the  
 22 business, that's currently -- and I think -- tell me  
 23 if this is correct -- has been true since the  
 24 late '90s and it's about 90 percent of PIBC's work?

25 MR. LEWIS: Objection to form.

5 (Pages 14 to 17)

Page 18

1 BY MR. BESSETTE:

2 Q. Is that fair?

3 A. Since the late '90s, I'd say it's at  
4 least 80 percent. At any point in time, that number  
5 can change pretty substantially in a short period  
6 depending on where we're spending our time. There's  
7 only a dozen of us, total, six or seven full-time  
8 professionals, so if we're working in a concentrated  
9 way on a deal for a month or two, that can skew things  
10 for that quarter pretty well, but if we're taking from  
11 the late '90s to today, I'm pretty confident we're  
12 80 percent plus on the litigation side and the balance  
13 corporate finance, and during certain periods it would  
14 be higher, yeah.

15 Q. Thanks for that answer, telling me  
16 how many staff and professional people you have,  
17 because I was going to go there, so I think we've got  
18 that.

19 It is correct, is it not, that --

20 strike that.

21 You do not consider yourself to be  
22 an expert concerning the legal aspects of SEC's  
23 regulations concerning registration statements under  
24 the 1933 Act; is that correct?

25 MR. LEWIS: Object to the form.

Page 20

1 of that study, by the way?

2 MR. LEWIS: Just for the record,  
3 it's Page 4, Paragraph 7.

4 MR. BESSETTE: Did I mix that up?  
5 MR. LEWIS: I think you said Page 7.

6 MR. BESSETTE: Thank you.  
7 MR. LEWIS: Just so we're looking at  
8 the same thing.

9 BY MR. BESSETTE:

10 Q. Do you remember any details about  
11 the study, what the purpose was?

12 MR. LEWIS: Objection to the form,  
13 overbroad.

14 THE WITNESS: I remember some things  
15 about the study. Probably more of it comes  
16 back to me as I think of it. We did that in  
17 order to prepare a series of writings which  
18 were printed as articles and compiled as a  
19 draft of a book and which were being provided  
20 at various forms and various stages to  
21 clients for informational purposes as they  
22 considered being public or going public. We  
23 generated what was called a CPM report,  
24 chart, of the process for people to use, and  
25 all that was in the context of consulting to

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1 THE WITNESS: Sure. I am not a  
2 lawyer; I don't give legal opinions. I don't  
3 consider myself an expert in the legal  
4 aspects of that. Having said that, there are  
5 -- certainly the entire context of things  
6 under the '33 Act is legal in nature, and I  
7 do think I have expertise with respect to  
8 understanding the investment community with  
9 respect to the meanings of those things as  
10 they apply to investment bankers, issuers,  
11 the contents of registration statements, and  
12 those sorts of things, but that, like I said,  
13 is from the point of view of understanding  
14 the investment community as opposed to from a  
15 legal perspective.

16 BY MR. BESSETTE:

17 Q. We're going to explore that  
18 expertise, the understanding you have about that, but  
19 I just wanted to get on the record that the legal  
20 aspect, you're not purporting to be an expert in.

21 A. Except for what I just said.

22 Q. I just wanted to ask real quick, on  
23 Page 7, the research that you have done that you  
24 indicate under Howard and Company, doing a detailed  
25 comprehensive study of 550 IPOs, what was the purpose

Page 21

1 prospective issuers and providing  
2 informational services and we conducted  
3 seminars on that topic for clients at that  
4 time.

5 BY MR. BESSETTE:

6 Q. These are the newsletters and  
7 presentations, the newsletters published by Howard and  
8 Company and the presentations from Howard and Company  
9 that are referred to in this bullet point?

10 MR. LEWIS: Objection to the form.

11 THE WITNESS: Right.

12 BY MR. BESSETTE:

13 Q. Have you authored any other  
14 publications other than those newsletters published by  
15 Howard and Company?

16 A. We did do the draft of the book. It  
17 never got published, at least while I was there, to my  
18 knowledge. I wrote some articles back in about that  
19 time frame and afterwards, probably up through the  
20 early '80s, generally on corporate finance or  
21 valuation topics, that appeared in some Pennsylvania  
22 CPA and legal publications.

23 Q. What are those publications; can you  
24 remember?

25 A. One of them was called the

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1 Pennsylvania CPA Journal. One was a legal trade  
2 publication in the Philadelphia area; I don't remember  
3 what that was called. I think there was another CPA  
4 publication, but I don't remember what that was either  
5 other than the Pennsylvania CPA Journal. I think  
6 that's it.

7 MR. LEWIS: Excuse me. Had you  
8 finished your answer about publications  
9 before Mr. Bessette went to the actual  
10 journals? I wasn't sure if he cut you off.

11 THE WITNESS: I think I finished.

12 BY MR. BESSETTE:

13 Q. What time frame are these  
14 publications you just referenced?

15 A. Mid '70s through early '80s at the  
16 latest.

17 Q. Have you published any articles in  
18 the last ten years?

19 A. No.

20 Q. Twenty years?

21 A. Twenty years, I don't think so.

22 Q. Have you published any articles that  
23 have been peer reviewed?

24 MR. LEWIS: Object to the form.

25 THE WITNESS: In the sense of

Page 24

1 Q. I know as a part of your report,  
2 you've got your prior testimony and depositions and  
3 retentions and all, so we've got the time frame. In  
4 all of your time as an expert witness, has your  
5 testimony ever been rejected by a court, that you're  
6 aware of?

7 MR. LEWIS: Objection to the form.

8 THE WITNESS: I'm not sure what you  
9 mean by the term rejected. I can think of  
10 one instance in which a court was distinctly  
11 unimpressed with it. I can think of one case  
12 in which a portion of an affidavit, I  
13 believe, was struck, if I remember the  
14 process correctly or the result correctly.  
15 Let me think here. I think there was another  
16 case in which a portion of an affidavit was  
17 struck for reasons of relevance.

18 BY MR. BESSETTE:

19 Q. Do you recall any of the names of  
20 those cases?

21 A. The first one I referred to was  
22 called Van de Walle versus Unimation. The second one  
23 is Safeguard Scientifics. The third one was a case in  
24 a Texas court involving a prospective class of holders  
25 of securities; I cannot remember the name of the case.

Page 23

1 articles, I actually don't know who read the  
2 ones I wrote so I couldn't tell you.

3 BY MR. BESSETTE:

4 Q. Do you understand what I mean by  
5 peer reviewed?

6 A. I understand it. Peer reviewed is a  
7 term that is used sometimes with a narrower meaning in  
8 the academic community as describing a process by  
9 which articles are submitted for publication and,  
10 prior to publication, reviewed by a group of people in  
11 the field.

12 Q. With that understanding of what peer  
13 reviewed means, have any of your articles been peer  
14 reviewed prior to publication that you're aware of?

15 A. I think the Howard and Company  
16 articles were reviewed by Graham Howard, by and large.  
17 The other articles, I don't believe were reviewed by  
18 anybody prior to publication that I can recall.

19 Q. How long have you been holding  
20 yourself out as an expert witness in litigation,  
21 providing expert services for litigation cases?

22 MR. LEWIS: Object to the form.

23 THE WITNESS: That began sometime in  
24 the late '70s.

25 BY MR. BESSETTE:

Page 25

1 Q. Krogman, does that sound familiar?

2 A. That's not it, no. Krogman was the  
3 case where the judge selected among factors advanced  
4 by two different experts, me and another one, and  
5 picked more factors favoring the other fellow's  
6 opinion than mine.

7 Q. That was a market efficiency case?

8 A. Yes.

9 The other Texas case was not -- I  
10 can't remember the name of that.

11 Q. Aside from sort of --

12 A. I think that's it.

13 Q. -- courts criticizing or striking  
14 portions, do you recall, as you sit here, whether  
15 there has been a legal challenge to you based on your  
16 opinion and the court refusing to accept you as an  
17 expert witness in a case?

18 MR. LEWIS: Objection to form,  
19 overbroad and vague.

20 Go ahead.

21 THE WITNESS: That has not occurred.

22 BY MR. BESSETTE:

23 Q. Who is your client in this case,  
24 sir?

25 A. The plaintiff class.

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1 Q. Last question from me: Go to your  
 2 report, Paragraph 22 on Page 13.

3 A. Right.

4 Q. You state that it is my opinion that  
 5 disclosure in the prospectus was inadequate in at  
 6 least the area of the risks and extent of gray  
 7 marketing and their potential significantly negative  
 8 effect on the company. I'm curious about the words at  
 9 least. Are there other areas where you think and it's  
 10 your opinion that the prospectus was inadequate in its  
 11 disclosures?

12 MR. LEWIS: Objection to the form.

13 THE WITNESS: As a topic area, I  
 14 don't believe so. I think the reason I tend  
 15 to word things this way is that, particularly  
 16 prior to rebuttal reports and that sort of  
 17 thing, is that to the extent that at least a  
 18 portion of what I'm asked to do is rebuttal,  
 19 I don't always know what's going to come up  
 20 in that early stage. I also don't know  
 21 specifically what questions I might be asked  
 22 around the area of disclosures which may come  
 23 out of this whole process, and the area that  
 24 I'm expecting to be asked about is gray  
 25 marketing, as we've been discussing today.

1 MR. LEWIS: Object to the form.  
 2 THE WITNESS: And the rest of the  
 3 sentence in that paragraph.

4 BY MR. BESSETTE:

5 Q. And, obviously, its potentially  
 6 significant negative effect, which is why you claim  
 7 there should have been a risk factor disclosure in the  
 8 prospectus?

9 A. Yeah, that's essentially correct,  
 10 and subject to the last answer about what other  
 11 questions I may be asked; yeah, that's correct.

12 MR. BESSETTE: I'll pass the  
 13 witness.

14 Thank you.

15 THE WITNESS: You're welcome.

16 MR. GLUCKOW: I suggest we take five  
 17 minutes to get reorganized.

18 (Recess.)

19 BY MR. GLUCKOW:

20 Q. Mr. Miller, good afternoon.

21 A. Good afternoon.

22 Q. I'm Paul Gluckow, with Simpson,  
 23 Thacher, and Bartlett. We represent the underwriter  
 24 defendants in this matter, so my questions this  
 25 afternoon will focus on those aspects of your reports

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1 If in the course of describing a  
 2 process of how the market works and how a  
 3 company becomes publicly traded, and that  
 4 sort of thing, questions are asked about what  
 5 may appear to be different areas but relate  
 6 back to gray marketing, I suppose that could  
 7 become a topic of testimony. For example,  
 8 what impact on pricing the offering might it  
 9 have had had the gray marketing disclosure  
 10 been X, just one example I can think of.  
 11 Then that might evoke an opinion.

12 That's kind of the thinking in  
 13 having it worded that way, but I don't expect  
 14 it to go off in new areas of -- well, for  
 15 example, when you just asked about the --

16 BY MR. BESSETTE:

17 Q. Questionable sales practices?

18 A. -- questionable sales practices,  
 19 accounting related to that, all that kind of stuff.

20 Q. As you sit here today, having  
 21 written your report and your rebuttal report and  
 22 seeing Mr. James' report and his rebuttal report, your  
 23 opinions concerning whether the prospectus was  
 24 inadequate are limited to the risks and extent of gray  
 25 marketing?

1 that have dealt with the underwriters' due diligence  
 2 issue.

3 A. Right.

4 Q. Based on the discussion today with  
 5 Mr. Bessette and other testimony that I've seen you've  
 6 given in the past, I think I can just do a little bit  
 7 more background in terms of your experience with due  
 8 diligence. My understanding is that in your career  
 9 you've conducted due diligence in connection with an  
 10 IPO on one occasion; is that correct?

11 MR. LEWIS: Objection to conducted.

12 Go ahead.

13 THE WITNESS: I don't believe so;  
 14 that is, there's one on which I recall  
 15 specifically being involved that was an  
 16 offering of common stock and warrants or  
 17 units; there was one involving -- pretty sure  
 18 it was a convertible preferred; there was  
 19 another that involved a debt security with  
 20 some kind of equity kicker. I did due  
 21 diligence on all those offerings.

22 Then there were a specific -- sorry,  
 23 there were offerings in which the firm I was  
 24 with was not a lead or co-lead underwriter or  
 25 in which we were not taking the lead role in

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1 (The pending question was read  
2 back.)

3 THE WITNESS: Yeah, except for the  
4 one or two, perhaps, in which I did specific  
5 due diligence assignments as part of a group  
6 but not with a primary responsibility for the  
7 whole due diligence function.

8 BY MR. GLUCKOW:

9 Q. Let's talk about those one or two.

10 Tell me what you recall about those.

11 A. Just that we as a consequence of  
12 being involved in a group of firms that acted together  
13 to do offerings upon occasion where someone else may  
14 have the primary responsibility for due diligence,  
15 they may have asked for assistance or staffing on  
16 follow-up on certain items or investigation of certain  
17 items, so I'd get a phone call or a memo or something  
18 that would say would you please look into the  
19 following and identify some area or tasks that we were  
20 asked to perform, then I would do that and then report  
21 back to whoever was asking me.

22 Q. That's when you were with Butcher?

23 A. Yes.

24 Q. What would have been the time frame  
25 for those one or two that you have in mind?

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1 offering where your employer was a lead or co-lead  
2 underwriter since at least 1980, correct?

3 A. Sure; that's correct.

4 Q. Have you published any articles on  
5 the topic of due diligence? I don't see any listed on  
6 your CV but I just want to confirm.

7 A. I don't recall exactly. We  
8 published quite a number of articles in the series of  
9 newsletters that I referred to earlier back in  
10 the '70s which involved a variety of financing  
11 techniques, a lot of which involved going public. I  
12 would be surprised if there wasn't some articles  
13 during that time on due diligence. Some of that might  
14 have been from the perspective of the officers and  
15 directors as opposed to the underwriters because our  
16 clients at that time tended to be prospective issuers  
17 as opposed to underwriters. That was a topic that was  
18 part of the research I had done on the 550 IPOs from  
19 '68 to '72 that I referenced earlier, and that,  
20 therefore, appeared in some of our publications around  
21 that time.

22 Q. These newsletters you're talking  
23 about would have been written in what time period, the  
24 early '70s?

25 A. '72 through '76.

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1 A. They would have been -- well,  
2 actually, '76 through '79.

3 Q. Again, your employer -- just to be  
4 clear on this, your employer, Butcher, was neither the  
5 lead nor the co-lead on those transactions, correct,  
6 the lead underwriter or the co-lead underwriter on  
7 those two transactions we're talking about?

8 A. Not that I'm thinking of. If we  
9 were one of the leads, we were not taking primary  
10 responsibility for due diligence in that sense.

11 Q. Let me try and boil this down, then.

12 In your career, you've conducted due  
13 diligence in connection with an initial public  
14 offering where your employer was a lead or co-lead  
15 underwriter on one occasion, and that was the Caesar's  
16 New Jersey matter in the '78 to '79 time period,  
17 correct?

18 A. Yeah; again, I think that's correct  
19 with the possible exception of one or two others in  
20 which we were not taking primary role for due  
21 diligence but may have appeared as the lead  
22 underwriter.

23 Q. Then it's also fair to say, I  
24 believe, that you have not been involved in due  
25 diligence in connection with an initial public

1 Q. These were not -- were these  
2 published to the world at large or were these client  
3 newsletters sent to clients and prospective clients of  
4 the firm?

5 A. They were sent to clients,  
6 prospective clients, and paid subscribers who tended  
7 to be prospective issuers and service providers to  
8 prospective issuers.

9 Q. As you sit here today, can you  
10 recall any newsletters that you worked on that  
11 specifically dealt with the topic of underwriters' due  
12 diligence?

13 A. No, I can't recall specifically, but  
14 as I said, it was part of the study that I did at that  
15 time and there was fairly intensive -- we wrote about  
16 just about every aspect of that study over a period of  
17 years. I'd be surprised if it was not covered in  
18 something we did but, again, the focus at that time  
19 from our point of view was more on the prospective  
20 issuer than on the underwriter, although we did cover  
21 all the participants in the process. Again, I can't  
22 recall specifically, but I would be surprised if it  
23 was not among those articles.

24 Q. Do you have copies of the articles?

25 A. No, I don't.

1 Q. How would you go about finding these  
 2 articles or newsletters if you wanted to?

3 A. I haven't been able to. I would  
 4 have asked the company or its successors but they are  
 5 now gone except for the group that publishes what's  
 6 now called, I believe, the IPO Reporter or the IPO  
 7 Journal, and the owner of that publication apparently  
 8 doesn't or wouldn't have them, but the group that  
 9 generates the editorial content, I've checked with and  
 10 they don't appear to have any of it either. As far as  
 11 I know, that's the last continuing thread of people.

12 Q. The study that you referred to, was  
 13 that study reduced to writing and published?

14 A. Not as one block of information like  
 15 that. It was presented in numerous client memos,  
 16 seminars, constituted a lot of the material for a  
 17 draft of a book that we didn't publish and that sort  
 18 of thing, but I don't recall that we ever put the  
 19 entire study together in one place like that.

20 We did publish at the time a CPM  
 21 chart of the process with annotated sections that  
 22 actually would have represented a summary of that, but  
 23 I don't think we actually ever produced the entire  
 24 work.

25 Q. Do you have any versions of the

1 the author because I did the study.

2 BY MR. GLUCKOW:

3 Q. Have you ever taught any courses  
 4 that addressed the topic of underwriters' due  
 5 diligence?

6 A. Not as a topic in itself, no. I  
 7 believe that may have been a brief portion of a talk  
 8 or couple of talks that I gave at the Wharton School  
 9 back in mid to late '70s or early '80s where some of  
 10 the topics included various types of financing  
 11 including going public and the roles of the  
 12 participants, some of the work that underwriters did  
 13 and that sort of thing.

14 Q. How many talks do you recall giving  
 15 at Wharton in the late '70s or early '80s that might  
 16 have addressed as a component underwriters' due  
 17 diligence?

18 A. There were at least three or four, I  
 19 believe, such talks.

20 Q. Any recollection as to what portion,  
 21 if any, of the talks would have addressed  
 22 underwriters' due diligence?

23 MR. LEWIS: Objection as to form.

24 THE WITNESS: In one sense, it was a  
 25 fairly small portion because the talks may

1 study in your possession today?

2 A. No.

3 Q. Do you have any idea how to get that  
 4 document if it exists as a document?

5 A. No, I'd give you the same answer as  
 6 the newsletters, same timing, same people.

7 Q. Putting aside the newsletters, which  
 8 may or may not have had something specific on  
 9 underwriters' due diligence, can you think of any  
 10 other publications that you've authored on the topic  
 11 of underwriters' due diligence?

12 MR. LEWIS: Objection to form.

13 THE WITNESS: No.

14 BY MR. GLUCKOW:

15 Q. I just want to confirm: On the  
 16 newsletters and the study we have talked about, to the  
 17 extent that there may have been at one time something  
 18 dealing with underwriters' due diligence, would that  
 19 have been something that you would have been a  
 20 principal author of, and if not, what would have been  
 21 your role?

22 MR. LEWIS: Objection to form.

23 THE WITNESS: I was either author or  
 24 editor of all of the articles that appeared  
 25 at that time, and of those, I would have been

1 have been 45 minutes to an hour and generally  
 2 covered the topics of the state of the public  
 3 markets for raising capital, the roles of  
 4 participants in the markets and those sort of  
 5 things, so as a part of the topic, I would  
 6 have thought, as part of the outline, it  
 7 would have been a fairly small portion;  
 8 however, the obsession of MBA students with  
 9 getting jobs in investment banking firms  
 10 tended to generate more questions in that  
 11 area than I would have expected and I did  
 12 spend more time on what underwriters do than  
 13 I probably otherwise would have.

14 BY MR. GLUCKOW:

15 Q. The audience for these talks were  
 16 MBA students; is that correct?

17 A. Yes.

18 Q. Can you think of any other courses  
 19 that you've taught or public lectures that you've  
 20 given of any kind on the topic of underwriter due  
 21 diligence?

22 A. I don't believe so.

23 Q. If you wouldn't mind turning to 334,  
 24 your initial report, Page 4, Paragraph 6, the last  
 25 sentence refers to PLI and similar programs and

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1 seminars on topics such as corporate finance and due  
 2 diligence?

3 A. Right.

4 Q. Can you recall any specific PLI or  
 5 similar programs or seminars that specifically address  
 6 underwriter due diligence that you've attended in the  
 7 last ten years?

8 A. No; in the last ten years, I don't  
 9 believe I've attended any seminars. We tend to get,  
 10 on an occasional basis, I guess I'd say, publications,  
 11 transcripts, and that sort of thing from those types  
 12 of seminars, and I get regular -- subscribe to a a  
 13 service called due diligence and securities  
 14 transactions by Robert Haft. I don't recall the  
 15 publisher of that, but it's in a workbook-sized  
 16 publication, updated about every two years or so, or  
 17 at least I get the updates about that often. That  
 18 would be more the type thing we do in the last ten  
 19 years.

20 The PLI actual seminars I attended  
 21 would have been earlier; back in the '70s and  
 22 early '80s, I think, was when I did that kind of  
 23 thing.

24 Q. You don't remember going to any  
 25 program such as that since the early '80s?

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1 I'd have to go through the testimony  
 2 list here and see what other ones there may have been.

3 Those are the first two I can think of.

4 Q. Just so I'm clear, I thought you  
 5 were referring to one matter but were you actually  
 6 referring to two different matters where investment  
 7 banker due diligence was at issue but it was not in  
 8 connection with an offering?

9 A. Correct.

10 Q. If you wouldn't mind looking at your  
 11 list of matters, tell me if you can think of any  
 12 others and we can go through them. Thank you.

13 A. One of the first two I mentioned was

14 No. 14.

15 Q. Which list are you on?

16 A. I'm sorry, expert witness testimony  
 17 in court.

18 Q. This is McKinley Allsop, Inc.?

19 A. Right.

20 The second one I was thinking of was

21 No. 25.

22 Q. Kenny v. Bear Stearns?

23 A. Right.

24 Another one was 26, which was in  
 25 connection with an offering. I just don't recall if

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1 A. No, I don't recall attending them  
 2 since the early '80s. Since then, I primarily relied  
 3 on obtaining the transcripts or the workbooks from  
 4 them or subscribing to other such materials as I've  
 5 described here.

6 Q. In the due diligence that you have  
 7 been involved in in your own career that you've  
 8 described, have you ever dealt with gray market  
 9 issues?

10 A. Not that I can recall.

11 Q. On Page 3 of your report -- again,  
 12 we're on 334 -- you state in Paragraph 3 that you've  
 13 been qualified or accepted as an expert on, among  
 14 other things, investment banking practices; is that  
 15 correct?

16 A. Right.

17 Q. Have you ever been qualified or  
 18 accepted as an expert concerning your opinions related  
 19 to underwriter due diligence specifically?

20 A. Good question. The cases that come  
 21 to mind first are two in which investment banker due  
 22 diligence was at issue but not in connection with  
 23 public offerings necessarily. It would be in  
 24 connection with other functions investment bankers  
 25 were performing or purporting to perform.

1 it was a public offering or a private placement at the  
 2 moment.

3 On the deposition and arbitration  
 4 testimony list, No. 1.

5 Q. Shearson?

6 A. Yes.

7 No. 8.

8 Q. American Dental Laser?

9 A. Right.

10 No. 12, No. 13, No. 15. I think  
 11 No. 18, as best I recall. I think No. 21, as best I  
 12 recall. No. 26, No. 50, No. 56. That's it.

13 Q. The ones you just gave me most  
 14 recently off of the deposition and arbitration  
 15 testimony list starting with the Shearson matter and  
 16 going down to the CFS matter, which is 56, Shearson  
 17 was one, those are all matters, I take it, where you  
 18 either provided a report or were deposed or both but  
 19 not, which is where we started, where you'd been  
 20 qualified or accepted as an expert concerning your  
 21 opinions related to due diligence; is that correct?

22 A. (No response.)

23 Q. Because it didn't get to trial, in  
 24 other words?

25 A. Correct.

1 Q. Going back to where we started in  
 2 terms of matters where you've been qualified or  
 3 accepted as an expert concerning your opinions related  
 4 to due diligence by underwriters, it would just be the  
 5 first three we started with, No. 14, No. 25, and  
 6 No. 26 off the expert witness testimony in court list,  
 7 correct?

8 A. Right; that's correct.

9 Q. No. 14, McKinley Allsop, that was  
 10 one of the matters you mentioned that involved  
 11 investment banker due diligence but did not involve  
 12 any kind of an offering; is that right?

13 A. Right.

14 Q. What was the issue in that case?

15 A. Whether McKinley Allsop had  
 16 adequately done its work in connection with the  
 17 issuance of a highly confident letter regarding  
 18 financing for Jetborne.

19 Q. No. 25, Kenny, was another one you  
 20 said where there was no offering involved but the  
 21 matter otherwise raised issues of due diligence; is  
 22 that correct?

23 A. Correct.

24 Q. What was the issue there?

25 A. Whether Bear Stearns performed

1 Q. Now that you've thought about it  
 2 some more, you think that the matter involved the  
 3 private placement as opposed to a public offering?

4 A. I think so. One of the reasons I'm  
 5 hesitating about that is that there were individual  
 6 purchasers involved as opposed to institutions, as  
 7 opposed to solely institutions, and it does raise that  
 8 question, but as best I can recall, it was a private  
 9 placement.

10 Q. As I understand it, you've never  
 11 offered testimony on behalf of a defendant in a matter  
 12 involving the issue of whether investment bankers did  
 13 due diligence properly; is that correct?

14 MR. LEWIS: Objection as to form.

15 THE WITNESS: I think that's  
 16 correct.

17 BY MR. GLUCKOW:

18 Q. As I understand it, you've never  
 19 written an expert report on behalf of a defendant in a  
 20 case involving the issue of whether the investment  
 21 bankers did due diligence properly; is that also  
 22 correct?

23 MR. LEWIS: Objection as to form.

24 THE WITNESS: That, I don't recall.  
 25 I don't recall testifying about that before.

1 properly in its role as financial advisor to Daisy  
 2 Systems including in connection with issuing a highly  
 3 confident letter and financing commitment and  
 4 providing advice about financing to Daisy Systems.

5 Q. No. 26, Alpha Group, you thought may  
 6 have involved a private placement but you weren't a  
 7 hundred percent sure?

8 A. Yeah, it was either a public  
 9 offering or private placement of bonds. The more I  
 10 think about that, it might have been a private  
 11 placement but the issue was similar.

12 Q. What was the issue, as you recall  
 13 it?

14 A. As to whether or not Bear Stearns  
 15 had performed adequate due diligence and insured  
 16 proper disclosure in a prospectus or offering  
 17 materials in connection with the sale of bonds.

18 Q. Do you have any materials related to  
 19 that matter?

20 A. I don't know.

21 Q. How would you find out?

22 A. I would look in the office.

23 Q. If you did, they would be maintained  
 24 at PIBC?

25 A. Right.

1 I don't recall if I may have written such a  
 2 report or not.

3 BY MR. GLUCKOW:

4 Q. Can you recall writing an expert  
 5 opinion that underwriters performed adequate due  
 6 diligence?

7 A. I can't recall whether I have or  
 8 not.

9 Q. As you sit here, you can't recall --  
 10 I'm sure you can recall reports you've written or  
 11 opinions you've offered that underwriters have not  
 12 performed adequate due diligence, correct?

13 MR. LEWIS: Objection to form.

14 THE WITNESS: At least the ones that  
 15 relate to matters printed on these lists, I  
 16 can jog my memory through the lists. Sitting  
 17 here, I can't recall others at the moment of  
 18 that type.

19 BY MR. GLUCKOW:

20 Q. The ones we talked about earlier off  
 21 of the trial testimony list, No. 14, 25, and 26, and  
 22 off of the deposition and arbitration list, one,  
 23 eight, 12, 13, 15, 18, 21, 26, 50, 56, I take it from  
 24 your answers that in each of those cases you were  
 25 offering an expert opinion stating that the

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1 Castle Pines, ClinCorp, US Wireless?  
 2 A. No, none of those.  
 3 Q. New America securities litigation?  
 4 A. No.  
 5 Q. Zelcor, American Dental, Shearson?  
 6 A. I can't recall.  
 7 Q. Alpha Group, Kenny or Mackinley?  
 8 Those are the other ones we talked about.  
 9 A. It wasn't Alpha Group. No, I don't  
 10 recall.  
 11 Q. But you do recall that AMF Bowling  
 12 was the other one?  
 13 A. Yes.  
 14 Q. The AMF report, which we'll mark in  
 15 a minute, was a model or a template for the section of  
 16 your report in this matter beginning with Paragraph 19  
 17 that dealt with the underwriters' due diligence; is  
 18 that correct?  
 19 MR. LEWIS: Objection to form and  
 20 foundation.  
 21 THE WITNESS: I don't know that I'd  
 22 put it quite as broadly. I think with  
 23 respect to the type of information that was  
 24 required by prospective underwriters, the  
 25 type of information relevant to that

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1 examination, process issues as to how the  
 2 underwriter should go about the work, what  
 3 level of detail to obtain, factors that are  
 4 important in conducting the work. In those  
 5 source of factors, I used some of the  
 6 language which I also used in AMF Bowling as  
 7 it applied to this case but reviewing it to  
 8 make sure that it did apply to this case and  
 9 modifying it if necessary.

10 Again, some of the work here has  
 11 been generated over the years from reviewing  
 12 Mr. Haft's series, the due diligence and  
 13 securities transaction materials, and other  
 14 publications and materials that we get  
 15 regularly on due diligence issues.

16 MR. GLUCKOW: Let's mark your  
 17 initial report of AMF Bowling.

18 (Mr. Miller's AMF Report was marked  
 19 Exhibit-351 for identification.)

20 BY MR. GLUCKOW:

21 Q. Mr. Miller, you have 351, which is  
 22 your initial report in AMF. Do you recognize that as  
 23 your initial report in the AMF Bowling matter?

24 A. Yeah, it appears to be that.

25 Q. If you would, compare Paragraphs 19

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1 and 20 from the Adams Golf initial report with  
 2 Paragraphs 6 and seven of the AMF Bowling report.  
 3 A. Right.  
 4 Q. They are very similar, correct?  
 5 A. Yeah, many of the bullet points are  
 6 the same. There are a couple that differ given the  
 7 differing nature of the two companies involved in  
 8 these two matters.  
 9 Q. The introductory language in 19 in  
 10 the Adams Golf report is the same as the introductory  
 11 language in six of the AMF report, correct?  
 12 A. Yes.  
 13 Q. The first bullet point is the same?  
 14 A. Right.  
 15 Q. The second bullet point is the same?  
 16 A. Yes.  
 17 Q. The third bullet point is the same?  
 18 A. Yes.  
 19 Q. The fourth bullet point is the same?  
 20 A. Yes.  
 21 Q. The fifth bullet point in Adams Golf  
 22 is new, correct?  
 23 A. Correct.  
 24 Q. Do you recall the process that led  
 25 to the adding of that bullet point and, specifically,

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1 did you think to add that yourself or was that a  
 2 suggestion from counsel or someone else?  
 3 A. No, that was my input, and it  
 4 reflects the various -- the differing stages of the  
 5 two companies; that is, AMF Bowling was a more  
 6 established, longer term company and Adams was a new,  
 7 fast-growing company with comparatively inexperienced  
 8 management, particularly in the public company arena,  
 9 and with a rapidly evolving business plan, so it was  
 10 an appropriate one for Adams that didn't apply so much  
 11 to AMF.  
 12 Q. The next bullet point is the same,  
 13 correct?  
 14 A. Correct.  
 15 Q. The next one is the same after that?  
 16 A. Correct.  
 17 Q. Then the -- I think the report of  
 18 Gerard Adams I read somewhere was a typo in your AMF  
 19 report, so we'll ignore that one.  
 20 MR. LEWIS: Objection to form.  
 21 BY MR. GLUCKOW:  
 22 Q. The two paragraphs that follow the  
 23 list of bullet points --  
 24 A. Continuing through the bullet points  
 25 after you left off there, the next one is different,

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1 the next one is different.

2 Q. Which one did you say was different?

3 A. The one that begins historical  
4 financial performance and trends.

5 Q. The first sentence is the same,  
6 correct?

7 A. The first sentence is the same. In  
8 Adams, I've added a sentence that relates to Adams'  
9 specific situation versus AMF's. The next bullet  
10 point in the AMF does not appear in Adams, the next  
11 bullet point is the same, and the report of Gerard  
12 Adams we've talked about.

13 Q. The next paragraph which begins in  
14 both reports with respect to each of is the same,  
15 correct?

16 MR. LEWIS: Off the record.

17 (Discussion held off the record.)

18 (Recess.)

19 (Mr. Rozen leaves the deposition.)

20 BY MR. GLUCKOW:

21 Q. Mr. Miller, have you had a chance to  
22 look at those paragraphs we were considering before  
23 the break?

24 A. Yes.

25 Q. As best I can tell, they are the

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1 report, in your initial report you did not offer any  
2 opinion regarding the adequacy or the inadequacy of  
3 the underwriters' due diligence and instead awaited  
4 receipt of the defendants' information, correct?

5 MR. LEWIS: Objection to the form.

6 THE WITNESS: Yes, except with  
7 respect to the disclosure and the prospectus  
8 issue, which I do address in the initial  
9 report in Adams Golf.

10 BY MR. GLUCKOW:

11 Q. You're referring to Paragraph 22 of  
12 Adams Golf?

13 A. Yes.

14 Q. Just so I'm clear, that

15 Paragraph 22, which I recognize is your opinion, in  
16 the initial report does not address the adequacy or  
17 the inadequacy of the underwriters' due diligence  
18 investigation, correct?

19 A. It doesn't address it separate from  
20 the publication in the prospectus of the information  
21 at issue; that's correct. Again, I discussed that  
22 topic a few minutes ago before the break. It does not  
23 discuss the investigation itself separate from the  
24 publication in the Adams Golf Paragraph 22.

25 Q. I just have to make sure I

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1 same except in the paragraph that begins the proper  
2 attitude in Adams Golf, instead of a period after  
3 issuer, there's a comma, and then there's a clause  
4 particularly with respect to a new company  
5 experiencing substantial and rapid growth, which is  
6 additional language in Adams Golf that's not in  
7 AMF Bowling, correct?

8 A. Correct.

9 Q. Otherwise, they are the same,  
10 correct?

11 A. Correct.

12 Q. In the AMF report, specifically in  
13 Paragraph 9, you actually offer an opinion that the  
14 due diligence investigation with respect to the public  
15 offering was inadequate, correct?

16 MR. LEWIS: Objection to form; it  
17 speaks for itself.

18 THE WITNESS: Yeah, in Paragraph 9  
19 of AMF, yeah, I give the opinion that the due  
20 diligence investigation and pricing analysis  
21 conducted by the QIU was inadequate.

22 BY MR. GLUCKOW:

23 Q. Were you finished?

24 A. Yes.

25 Q. As we've discussed in the Adams Golf

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1 understand this correctly. Twenty-two is saying that  
2 it's your opinion that the disclosure in the  
3 prospectus was inadequate in the area of gray  
4 marketing and the effect that might have on the  
5 company, correct?

6 A. Right; right.

7 Q. There's nothing in 22 that addresses  
8 -- or anywhere else in the initial report that  
9 addresses whether the underwriters' due diligence  
10 investigation was or was not adequate, correct?

11 MR. LEWIS: Objection to the form  
12 and foundation.

13 THE WITNESS: There's nothing else  
14 that addresses that; that's correct. Having  
15 said that, I don't believe that you can, on a  
16 practical basis, have an adequate and  
17 reasonable underwriters' due diligence  
18 investigation resulting in the nonpublication  
19 in the prospectus of the information that's  
20 at issue.

21 BY MR. GLUCKOW:

22 Q. Are you taking away the due  
23 diligence defense from the underwriters? I'm not  
24 following you.

25 MR. LEWIS: Objection to form.

1 THE WITNESS: I don't think so.  
 2 That is, if the underwriter performs a  
 3 reasonable and adequate due diligence  
 4 investigation and discovers a problem, and it  
 5 does not then put in the prospectus, or  
 6 insist be put in the prospectus, I don't  
 7 believe he has conducted his necessary  
 8 reasonable and adequate due diligence  
 9 investigation to afford him the defense. It  
 10 just doesn't make any sense that that would  
 11 be the case, so with respect to the  
 12 publication part of that function, my  
 13 Paragraph 22 addresses that. It does not  
 14 address separately whether or not the  
 15 investigation part of the function was  
 16 performed adequately or reasonably in this  
 17 case.

18 BY MR. GLUCKOW:

19 Q. Everything you just said is based on  
 20 what, because you're not a lawyer, right?

21 A. That's correct.

22 Q. You have no legal training, haven't  
 23 gone to law school?

24 A. I don't have legal training. I have  
 25 not gone to law school. I have obviously read the

1 MR. LEWIS: Objection to form,  
 2 foundation, incomplete hypothetical,  
 3 argumentative.

4 BY MR. GLUCKOW:

5 Q. I'm not trying to be argumentative,  
 6 I'm just trying to understand.

7 A. I think not necessarily, I guess, is  
 8 the answer. I think that -- let me put it this way if  
 9 I can -- if I understand what you're asking, I believe  
 10 it is possible for underwriters to conduct a  
 11 reasonable and adequate due diligence investigation  
 12 and still be misled or defrauded in certain  
 13 circumstances, but I don't believe those circumstances  
 14 exist here, and at the time I prepared my initial  
 15 report I was prepared to say what I did in  
 16 Paragraph 22 but awaited the report of the defendants'  
 17 expert to see if they then established that they had  
 18 performed a reasonable and adequate due diligence  
 19 investigation, notwithstanding the omission from the  
 20 prospectus of what I considered to be material  
 21 information.

22 Q. Let's assume that the report that  
 23 you then received from the defendants established a  
 24 reasonable and adequate due diligence investigation.  
 25 Okay?

1 Securities Act a number of times, read and reviewed  
 2 and attended PLI materials and that sort of thing, but  
 3 my expertise in the area is as I discussed before, in  
 4 the context of the investment banking and investment  
 5 community's understanding of these matters.

6 Q. I just want to make sure --

7 A. I also -- sorry -- further in that  
 8 area have reviewed case law and opinions and that sort  
 9 of thing in this area as well.

10 Q. I'm just going to do this  
 11 hypothetically to find out whether I can understand  
 12 what you are saying.

13 Assume that there's a prospectus  
 14 that's defective, it has a misstatement or an omission  
 15 in it, a material misstatement or omission, and also  
 16 assume that the underwriters have conducted a  
 17 reasonable due diligence investigation where they've  
 18 identified an issue, and they actually believe and  
 19 have reasonable grounds to believe that the  
 20 registration statement and prospectus are complete and  
 21 accurate, don't have any material misstatements, don't  
 22 omit any material facts; you do recognize, I take it,  
 23 that in that circumstance the underwriters are  
 24 entitled to a due diligence defense even if the  
 25 prospectus is defective, correct?

1 A. Right.

2 Q. You would then agree that the  
 3 underwriters could take advantage of their affirmative  
 4 defense, correct?

5 MR. LEWIS: Objection as to  
 6 foundation, incomplete hypothetical, vague  
 7 and indeterminate.

8 THE WITNESS: Yeah, if I understand  
 9 your question correctly, I think that's a  
 10 possibility.

11 BY MR. GLUCKOW:

12 Q. They could still be entitled to  
 13 their due diligence defense, notwithstanding your  
 14 opinion in 22 that there was a problem with the  
 15 prospectus, correct?

16 MR. LEWIS: Objection to form.

17 THE WITNESS: I think that that is  
 18 possible, yes.

19 BY MR. GLUCKOW:

20 Q. We may have to come back to that  
 21 later but let's leave it there for now.

22 A. Just to be clear, I view that as a  
 23 hypothetical question. Having been through this  
 24 process so far in this case, I don't believe it  
 25 occurred.

1 Q. You don't believe there was a  
 2 reasonable investigation by the underwriters?

3 A. Right. I don't believe there was  
 4 one and I don't believe the defendants have  
 5 established that there was one. Maybe I should do  
 6 that in reverse order. I don't believe -- perhaps  
 7 more importantly, I don't believe defendants have  
 8 established they performed such an investigation.  
 9 From what I have seen, I also believe they have not  
 10 performed such investigation.

11 Q. The first point that you just made,  
 12 which is your point that in your view the underwriters  
 13 have not established that they conducted a reasonable  
 14 investigation, as we'll see, that opinion is in your  
 15 rebuttal report, correct?

16 A. Right.

17 Q. The other opinion that you just  
 18 articulated, which is that you have an opinion that,  
 19 in fact, the underwriters did not conduct a reasonable  
 20 investigation, show me where that is in any of your  
 21 reports in this case.

22 A. I don't know that I've stated that  
 23 that way prior to this discussion here.

24 Q. In fact, you haven't, correct?

25 A. I don't recall whether I did or not.

1 Q. Have you been asked to form an  
 2 opinion on that question, that question being whether  
 3 in your opinion the underwriters conducted a  
 4 reasonable investigation?

5 A. I don't think I've been specifically  
 6 asked so far to form that opinion. I think I've been  
 7 asked to address the issue of whether the defendants  
 8 established that. In the course of reviewing the  
 9 materials that I've reviewed, based on what I've seen  
 10 to date and as part of my work in determining whether  
 11 the defendants have met their burden in that regard, I  
 12 have formed an opinion about that but, again, I don't  
 13 know if I will be asked about that and have not  
 14 discussed that in that sense with counsel.

15 Q. What's your current understanding  
 16 regarding whether you intend to offer an opinion at  
 17 trial concerning whether the underwriters conducted a  
 18 reasonable due diligence investigation?

19 MR. LEWIS: Objection, asked and  
 20 answered.

21 THE WITNESS: I don't have a current  
 22 understanding as to whether I would be asked  
 23 that or not. What I've been asked so far is  
 24 do I believe the defendants have established  
 25 that they conducted such an investigation.

1 Q. Take a look at your opening report  
 2 and your rebuttal report, and if you can find it, show  
 3 me where it is.

4 MR. LEWIS: Did you have something  
 5 else to say?

6 THE WITNESS: Yeah. I think in  
 7 connection with the discussion we've been  
 8 having is why this arose; that is, you asked  
 9 these questions and I'm answering them. You  
 10 asked if I had an opinion about that and I  
 11 gave it to you.

12 My understanding is the way this  
 13 works is that the defendants are afforded the  
 14 opportunity to establish such a defense, and  
 15 in my view, they have not done so, and that,  
 16 from a legal perspective, may be where it  
 17 ends. That's the area in which I was asked  
 18 to opine and that's the area about which I  
 19 have opined.

20 In the course of our conversation,  
 21 then, I believe you asked me if I had an  
 22 opinion about that and I said I do, but  
 23 whether or not I offer that is a matter of  
 24 what counsel decides to pursue.

25 BY MR. GLUCKOW:

1 It's -- I don't know whether I would be asked  
 2 to go to the next step of your question and  
 3 determine whether I have an opinion on  
 4 whether the due diligence investigation was  
 5 adequate or not.

6 BY MR. GLUCKOW:

7 Q. Just to be clear, you agree with me  
 8 that in your two written opinions to date, you have  
 9 not offered an opinion on that latter question,  
 10 namely, whether in your opinion the underwriters  
 11 conducted a reasonable due diligence investigation,  
 12 correct?

13 MR. LEWIS: Objection to form; the  
 14 documents speak for themselves.

15 THE WITNESS: I think that's  
 16 correct, but I'll be glad to check them and  
 17 see if I did say that or not.

18 BY MR. GLUCKOW:

19 Q. Only if you feel the need to. I'm  
 20 quite sure you have not given that opinion, but if you  
 21 want to be comfortable with that, please take your  
 22 time to do so.

23 A. No, in the way we've been  
 24 discussing, I have not offered that so far.

25 Q. Thank you.

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1 In terms of the materials  
 2 considered, Mr. Bessette went over this with you a  
 3 little bit and I won't take much time on it, but if  
 4 you would turn to Page 6 of your initial report,  
 5 Paragraph 11, in connection with the underwriters' due  
 6 diligence, how did you decide what materials you  
 7 wanted to review?

8 A. I asked counsel what underwriter  
 9 materials had been produced, if there was a document  
 10 production, and what testimony there was on that  
 11 topic, and they identified that for me as the  
 12 deposition transcripts and the related exhibits.

13 Q. Did counsel explain to you that  
 14 there was, in fact, a separate underwriter production  
 15 referred to in Mr. Necarsulmer's report which I know  
 16 you've seen, UND1 through 11,636?

17 MR. LEWIS: Objection to form.

18 THE WITNESS: Yeah, there was -- we  
 19 had some discussion about that, yes.

20 BY MR. GLUCKOW:

21 Q. What do you recall about the  
 22 discussion?

23 A. I asked what there was in the way of  
 24 underwriter production. It was described to me there  
 25 was some amount of it; I don't recall how it was

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1 I think that might be correct overall. I have seen  
 2 some underwriter documents or documents that have UND  
 3 markings on them that I don't recall necessarily being  
 4 referenced in transcripts, but I haven't tried to  
 5 match them up that way, so it may be that they are all  
 6 deposition transcripts, I don't know that.

7 Q. In what connection did you see the  
 8 documents with the UND on them where you think there's  
 9 at least a possibility that they may not have been  
 10 deposition transcripts?

11 A. Just in the normal course of  
 12 reviewing materials in the litigation.

13 Q. You're not aware of any category of  
 14 documents or information received from the  
 15 underwriters' production, as you sit here now, other  
 16 than those marked as deposition exhibits, correct?

17 THE WITNESS: Can I have that back?  
 18 (The pending question was read  
 19 back.)

20 MR. LEWIS: Objection to form.

21 THE WITNESS: I think that's  
 22 correct. I'm not aware underwriters'  
 23 documents have been categorized otherwise.

24 BY MR. GLUCKOW:

25 Q. For example, I'm looking at your

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1 characterized to me. I asked what it was and if  
 2 anybody had gone through it, I believe. I don't  
 3 recall specifically what we discussed about it beyond  
 4 that. It was not a terribly long discussion about it.  
 5 I don't recall who suggested it, but I came to the  
 6 conclusion that I would see what it was that  
 7 Mr. Necarsulmer produced from that document production  
 8 to support his opinion, whatever it was going to be.

9 Q. As you sit here today, you have  
 10 never received or reviewed the underwriters' document  
 11 production in this case; is that correct?

12 MR. LEWIS: Objection to form.

13 THE WITNESS: It's probably correct  
 14 with respect to all of it. I know there have  
 15 been some documents with UND numbers on them  
 16 and other documents referred to in deposition  
 17 transcripts and that sort of thing, but I  
 18 don't believe I have anywhere near the volume  
 19 that I understand exists.

20 BY MR. GLUCKOW:

21 Q. In fact, at least according to the  
 22 list on Page 11, the only UND documents you would have  
 23 received from the underwriters' production would have  
 24 been those marked as exhibits at depositions, correct?

25 A. From this list, that's correct, and

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1 bullet point listed on Page 6 and I'm just trying to  
 2 think is there any way that the underwriters' document  
 3 production could be captured in any of those other  
 4 bullet points, and I'm not able to come up with any  
 5 way and I'm asking you whether you can. These are the  
 6 materials that you considered, correct, at least as of  
 7 the time of your initial report?

8 MR. LEWIS: Objection to form.  
 9 THE WITNESS: No, I think you're  
 10 correct, and as we discussed earlier.

11 BY MR. GLUCKOW:

12 Q. What about the underwriters'  
 13 responses and objections to the plaintiff's sixth set  
 14 of interrogatories, which were the underwriters'  
 15 responses to the plaintiff's so-called contention  
 16 interrogatories? Those are not listed here. Have you  
 17 ever reviewed those, to your knowledge?

18 MR. LEWIS: Objection to form.

19 THE WITNESS: I don't recall,  
 20 specifically. There is at least one set of  
 21 interrogatory answers that I have reviewed.  
 22 I do not recall off the top of my head if  
 23 those are underwriters or not.

24 BY MR. GLUCKOW:

25 Q. Are those interrogatory answers that

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1 you're thinking of listed in the materials that you've  
 2 considered in any of your reports?

3 A. No.

4 MR. GLUCKOW: Can we mark this,  
 5 please.

6 (Document Bates Stamped  
 7 MIL 00090-00115 was marked Exhibit-352 for  
 8 identification.)

9 BY MR. GLUCKOW:

10 Q. I'm handing you what's been marked  
 11 as 352; it's from your production in this matter. Is  
 12 that the set of interrogatory responses you had in  
 13 mind?

14 A. Yeah, I believe it is.

15 Q. Those are the Adams Golf defendants'  
 16 responses to the plaintiff's fifth set of  
 17 interrogatories, correct?

18 A. Correct.

19 Q. Then to the best of your knowledge,  
 20 you have not reviewed the underwriters' responses and  
 21 objections to the plaintiff's sixth set of  
 22 interrogatories, correct?

23 A. Yeah, I think that's correct.

24 Q. Did you review the depositions of  
 25 the underwriter witnesses?

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1 exhibits from the reports -- the transcripts,  
 2 I'm sorry. I think I had a conversation with  
 3 counsel as to whether there was any factual  
 4 information I was missing in this context  
 5 from what I had reviewed and then wrote this  
 6 language, so that process may have taken five  
 7 to 15 hours -- I'm trying to give you some  
 8 decent estimate there -- maybe a little  
 9 longer than that, somewhere in that  
 10 neighborhood.

11 BY MR. GLUCKOW:

12 Q. I think you anticipated my next  
 13 question because I believe the answer you just gave,  
 14 five to 15 hours, somewhere in that neighborhood,  
 15 maybe a little more than that, wasn't just in terms of  
 16 drafting these paragraphs but also included the time  
 17 you spent considering the issues discussed in those  
 18 paragraphs, correct?

19 MR. LEWIS: Objection to form.

20 THE WITNESS: Right.

21 BY MR. GLUCKOW:

22 Q. In terms of that conversation with  
 23 counsel you just mentioned, do you recall anything  
 24 else about that other than what you testified to  
 25 already?

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1 A. I did.

2 Q. Did you review specifically the  
 3 deposition transcript of Olga Pulido-Crowe?

4 A. I did.

5 Q. Did you read the entire transcript  
 6 or just selected portions?

7 A. No, I read it all.

8 Q. Did you read the exhibits that were  
 9 referred to during that deposition?

10 A. Yes.

11 Q. In your rebuttal report, 335,  
 12 Pages 22 to 23 address Mr. Necarsulmer's report?

13 A. Right.

14 Q. I'm going to ask you the same  
 15 question I asked you about your initial report, which  
 16 is your best estimate for the amount of time it took  
 17 you to draft Paragraphs 23, 24, and 25 of the rebuttal  
 18 report.

19 MR. LEWIS: Objection to the form.

20 THE WITNESS: In this connection, I  
 21 read Mr. Necarsulmer's report, I reviewed  
 22 Ms. Pulido-Crowe's transcript, I reviewed  
 23 Mr. Walravens' transcript or -- I think prior  
 24 to writing this report, I skimmed  
 25 Mr. Walravens' transcript and reviewed the

1 MR. LEWIS: Objection to form.

2 THE WITNESS: No, it was a fairly  
 3 brief conversation of the nature I said. I  
 4 had summarized what I had observed existed,  
 5 asked if there was anybody else involved in a  
 6 significant way in the process, other  
 7 information that might be missing of that  
 8 type, and I think that was the nature of the  
 9 conversation.

10 BY MR. GLUCKOW:

11 Q. What was the answer to that  
 12 question?

13 A. Basically, no.

14 Q. The information that you had  
 15 indicated that you had focused on already, if I  
 16 understood your prior answers correctly, was the Olga  
 17 Pulido-Crowe deposition transcript and the Walravens'  
 18 transcript, correct?

19 A. And the exhibits.

20 Q. And the exhibits of those  
 21 depositions?

22 A. Yeah. I maybe get your question.  
 23 That is the primary information I looked at related to  
 24 this topic.

25 Q. Can you think of any other category

1 Necarsulmer. I take it you don't recall reviewing any  
 2 other materials in connection with the preparation of  
 3 your rebuttal report?

4 MR. LEWIS: Objection to form.

5 THE WITNESS: I think that that's  
 6 correct. I don't recall any other materials  
 7 as I sit here.

8 BY MR. GLUCKOW:

9 Q. I'm going to hand you  
 10 Mr. Necarsulmer's initial report, which has already  
 11 been marked as 321 (indicating). Keep your rebuttal  
 12 report open as well.

13 In the first two sentences of your  
 14 Paragraph 23 in your rebuttal, you address in a  
 15 general way the outline of responsibilities that  
 16 Mr. Necarsulmer has provided. I take it you do not  
 17 disagree with Mr. Necarsulmer's general outline of  
 18 what underwriters are supposed to do as part of their  
 19 due diligence; is that correct?

20 MR. LEWIS: Objection to form,  
 21 foundation.

22 THE WITNESS: No, I don't think I  
 23 have a problem with his outline. I think  
 24 enough areas of it are general enough to  
 25 cover most of the important areas you'd want

1 BY MR. GLUCKOW:

2 Q. I'm sorry; go ahead.

3 A. Paragraph 1 on Page 3, it appears to  
 4 be Mr. Necarsulmer's opinion that the offering process  
 5 was staffed by a team of sufficient size, experience,  
 6 and seniority to be appropriate for the project; the  
 7 offering process was staffed by a team. He then makes  
 8 the judgment as to the rest of the sentence.

9 Q. Let's do it that way, then. Do you  
 10 disagree that the team was of sufficient size,  
 11 experience, and seniority to be appropriate to the  
 12 project or do you just not have an opinion one way or  
 13 the other on that, or do you agree?

14 A. First off, I think what I've said  
 15 about this is that his descriptions of these things  
 16 are extremely general. They don't refer to people,  
 17 describe their backgrounds, refer to documents  
 18 reviewed, information discovered, much more  
 19 importantly independent analysis performed by the  
 20 underwriters, investigation work, and that sort of  
 21 thing except in the most general terms, so you can't  
 22 tell from his presentation what was done to discharge  
 23 the obligation to conduct a reasonable investigation  
 24 to come to the conclusions that they came to.

25 That was, at least at the first

1 to get into.

2 BY MR. GLUCKOW:

3 Q. When you were responding to my  
 4 question, I'm assuming you were looking at 6A and 6B  
 5 of Mr. Necarsulmer's initial report where he provides  
 6 those general contours; is that correct?

7 MR. LEWIS: Objection to form.

8 THE WITNESS: Correct.

9 BY MR. GLUCKOW:

10 Q. Then on Pages 3 and 4,  
 11 Mr. Necarsulmer gives a list of 11 areas of activity  
 12 that he believes the underwriters undertook as part of  
 13 their due diligence. I take it you don't dispute that  
 14 the activities reflected in one through 11 actually  
 15 took place; is that correct?

16 MR. LEWIS: Objection to form and  
 17 foundation.

18 THE WITNESS: I'm sorry, could I  
 19 have the question back?

20 (The pending question was read  
 21 back.)

22 THE WITNESS: There's some judgment  
 23 calls in here so I'm not sure I can answer  
 24 it, the way I understand you're asking, that  
 25 is.

1 instance, the level of information that I was  
 2 responding to in my opinions, that is, that  
 3 specifically with respect to the gray marketing issue,  
 4 there's no mention of it in here, there's no  
 5 indication that the issue was uncovered, discussed,  
 6 analyzed, that independent information was obtained to  
 7 evaluate it, that the impact of it was considered in  
 8 any fashion, so I don't see where the generalities  
 9 that Mr. Necarsulmer describes in these various  
 10 categories established the adequacy of the  
 11 investigation conducted by the underwriters in this  
 12 matter.

13 Q. Are you finished?

14 A. Yeah, I think that responds to your  
 15 question.

16 Q. Not at all. Move to strike.

17 MR. GLUCKOW: Read back my question.

18 (The preceding question was read  
 19 back as follows:

20 Question: Let's do it that way  
 21 then. Do you disagree that the team was of  
 22 sufficient size, experience, and seniority to  
 23 be appropriate to the project or do you just  
 24 not have an opinion one way or the other on  
 25 that, or do you agree?)

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1 THE WITNESS: In terms of presenting  
 2 a defense theory, it does not discuss the  
 3 people, their backgrounds, their experience,  
 4 why he thinks they were qualified, what work  
 5 they did, how they were supervised, and that  
 6 sort of thing. There's no information  
 7 presented except the conclusion that he comes  
 8 to.

9 BY MR. GLUCKOW:

10 Q. I'm asking you whether you agree  
 11 with that conclusion or whether you haven't formed any  
 12 opinion on it at all.

13 MR. LEWIS: Objection to form,  
 14 foundation, and scope of opinion.

15 Go ahead.

16 THE WITNESS: Regarding  
 17 Mr. Necarsulmer's work, I was asked to  
 18 determine if he established that the  
 19 underwriters had conducted an adequate  
 20 investigation as we've been discussing, and  
 21 what I'm saying is with respect to  
 22 Paragraph 1 specifically and then more  
 23 generally the rest of this work, that he has  
 24 not presented any information on which  
 25 someone could make that determination. What

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1 Ms. Pulido-Crowe was hoping to become a  
 2 managing director and was at the time -- I  
 3 forgot the next title, I think it was vice  
 4 president -- conducting oversight on the  
 5 work, much of which was delegated to  
 6 Mr. Walravens and a financial analyst whose  
 7 name, unfortunately, I can't recall, and that  
 8 I'm not sure I saw any evidence of  
 9 involvement by more senior personnel with  
 10 perhaps more business experience and  
 11 background with regard to critical issues  
 12 such as gray marketing, and if the team had  
 13 the experience to be appropriate for the  
 14 project, I saw no evidence of inclination to  
 15 perform independent analysis with respect to  
 16 the gray market issue specifically from that  
 17 team, which suggested either a lack of  
 18 experience in the area or a simple failure to  
 19 follow up on information that was obviously  
 20 deserving of follow-up.

21 BY MR. GLUCKOW:

22 Q. You don't dispute that the  
 23 underwriters had discussions with senior management at  
 24 the company concerning the gray market issue, correct?

25 MR. LEWIS: Objection to form.

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1 he's presented is his conclusions as to those  
 2 things.

3 BY MR. GLUCKOW:

4 Q. I understand that you're not happy  
 5 with Mr. Necarsulmer's report, and that's fine, we'll  
 6 deal with that. What I'm asking you is whether you  
 7 have any opinion of your own regarding whether the  
 8 offering process was staffed by a team of sufficient  
 9 size, experience, and seniority to be appropriate for  
 10 the project, and if you haven't formed an opinion on  
 11 that, that's fine, just tell me that.

12 MR. LEWIS: Objection to form and  
 13 foundation.

14 Go ahead.

15 THE WITNESS: I've had thoughts  
 16 about that. I don't know that I've actually  
 17 formed a formal opinion on that as you're  
 18 asking me, as I think you may be asking me  
 19 here.

20 My thoughts in that area have been  
 21 that there was no managing director actually  
 22 involved in the process, as far as I could  
 23 tell. From the information I've reviewed so  
 24 far, Mr. Francis was a figurehead whose  
 25 fingerprints are not on the project, that

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1 THE WITNESS: No, I don't dispute,  
 2 from what I've seen, that they had  
 3 discussions with a couple of management  
 4 people about the topic.

5 BY MR. GLUCKOW:

6 Q. You don't dispute that the  
 7 underwriters conducted telephone interviews with at  
 8 least seven of Adams' top customers concerning a  
 9 variety of topics, correct?

10 MR. LEWIS: Objection to form and  
 11 foundation.

12 THE WITNESS: No, I don't dispute  
 13 that from what I can see those interviews  
 14 took place; no.

15 BY MR. GLUCKOW:

16 Q. Don't you consider those interviews  
 17 an example of the kind of independent verification  
 18 that you're referring to?

19 A. No. That is that the conduct of  
 20 outside interviews absent management participation is  
 21 important, but when no specific questioning is made  
 22 about the gray marketing or the effect of gray  
 23 marketing, more importantly, no contact was made with  
 24 any of the people who had complained about gray  
 25 marketing, no documentation or correspondence was

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1 reviewed with respect to the complaints about gray  
 2 marketing, no independent follow-up was made to  
 3 determine if it was a problem or what the impact of it  
 4 was other than the assurance that I believe it was  
 5 Mr. Adams gave to Ms. Pulido-Crowe with respect to  
 6 Costco by saying don't pursue your own independent  
 7 inquiry of Costco, I'll take care of them, or  
 8 something to that effect, and/or Ms. Pulido-Crowe's  
 9 assessment that since her husband wouldn't purchase  
 10 sporting goods items at Costco, that it was not likely  
 11 to be a threat to Adams Golf.

12 Those are what I remember about the  
 13 disposition of the issue with management, but that  
 14 seemed to end the inquiry, from what I can tell.

15 Q. One of the things you said in that  
 16 answer was that there was no mention of the gray  
 17 marketing issue in the customer surveys; is that  
 18 correct?

19 A. Right.

20 Q. There was a specific question that  
 21 said are there any other issues, legal, contractual,  
 22 or otherwise, which you feel are important; isn't that  
 23 correct?

24 MR. LEWIS: Objection to form.

25 THE WITNESS: I understand that was

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1 and form; misstates the evidence.

2 THE WITNESS: I don't recall seeing  
 3 any mention in the responses of Costco or  
 4 gray marketing.

5 BY MR. GLUCKOW:

6 Q. Mr. Necarsulmer says, in his  
 7 rebuttal report which I know you've seen, these kinds  
 8 of interviews with independent parties are the type of  
 9 work underwriters should engage in to confirm  
 10 discussions with company management. Don't you agree  
 11 with that?

12 MR. LEWIS: Objection to form.

13 THE WITNESS: Again, as a general  
 14 category, I certainly agree that underwriters  
 15 should conduct independent interviews with  
 16 outside parties to confirm information they  
 17 have received from management. Whether or  
 18 not the way these were done, the basis of the  
 19 selection of the parties to interview, and  
 20 all those sorts of things were adequate are,  
 21 I think, question marks at this point in that  
 22 area.

23 BY MR. GLUCKOW:

24 Q. Again, the only deposition  
 25 transcripts of underwriters you can recall reading are

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1 a question on the outline.

2 BY MR. GLUCKOW:

3 Q. You understand that was a question  
 4 that was asked of the customers who were interviewed  
 5 by the underwriters, correct?

6 A. I understood it was a question on  
 7 the outline to be asked. I don't recall reading  
 8 enough detail about the actual conversations to know  
 9 if it was asked or how it was asked or what the  
 10 inclination of the customer would have been to provide  
 11 the information over the telephone, what their  
 12 attitude toward Adams was at that point as a customer  
 13 trying to acquire a hot club in that market. I don't  
 14 know a lot of those things about the customer  
 15 interviews over the telephone.

16 Q. Did you review the actual record  
 17 reflecting the 11 interviews that the underwriters  
 18 conducted which show the responses received?

19 A. I saw at least some of that  
 20 information in some exhibits, yes.

21 Q. Isn't it true that in going through  
 22 each and every one of those 11 telephone interviews,  
 23 not a single one of the responses indicated any  
 24 concern about gray market or Costco?

25 MR. LEWIS: Objection to foundation

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1 Pulido-Crowe and Walravens', correct?

2 MR. LEWIS: Objection to form.

3 THE WITNESS: I believe that's  
 4 correct.

5 BY MR. GLUCKOW:

6 Q. You've never reviewed the  
 7 underwriters' document production in this case,  
 8 correct?

9 A. Other than those we've discussed.

10 Q. Other than as marked as exhibits at  
 11 depositions, correct?

12 A. I think that's correct.

13 Q. You referred to a conversation  
 14 between Pulido-Crowe and Mr. Adams regarding gray  
 15 marketing and Costco. Is it your understanding that  
 16 the only discussions that the underwriters had  
 17 concerning the gray market issue took place between  
 18 Ms. Pulido-Crowe and Mr. Adams?

19 MR. LEWIS: Objection to form.

20 THE WITNESS: No, I don't think  
 21 that's necessarily right. I think there were  
 22 conversations with one of the other  
 23 management people at least, maybe two others,  
 24 of the salespeople --

25 BY MR. GLUCKOW:

72 (Pages 282 to 285)

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1 Q. Gonsalves?  
 2 A. -- the sales executives, Gonsalves  
 3 and --  
 4 Q. Beebe?  
 5 A. -- possibly Beebe, about that topic.  
 6 Q. How many conversations are you aware  
 7 of between the underwriters and Adams' management  
 8 concerning the gray marketing or Costco issue?  
 9 A. As far as I can recall, I don't  
 10 recall reference to more than a few outside of the  
 11 Hoffman letter issue, if we can call it that, but with  
 12 respect to pursuing independent investigation and that  
 13 sort of thing, essentially none.  
 14 MR. LEWIS: I want to back up and  
 15 retroactively object to the question  
 16 suggesting that there was a conversation with  
 17 Beebe since the record does not reflect any  
 18 such conversation. It misstates --  
 19 MR. GLUCKOW: I disagree with your  
 20 characterization, but the record will speak  
 21 for itself.  
 22 BY MR. GLUCKOW:  
 23 Q. What's your basis for saying that  
 24 Mr. Francis's role was purely as a figurehead?  
 25 A. Ms. Pulido-Crowe's testimony to that

1 of conducting investigation or interviews or  
 2 any of those sorts of functions other than,  
 3 as Pulido-Crowe describes, in what I'll call  
 4 a more political role.  
 5 BY MR. GLUCKOW:  
 6 Q. Is it your opinion the underwriters  
 7 should have contacted Costco?  
 8 MR. LEWIS: Objection to form and  
 9 foundation.  
 10 THE WITNESS: I don't know, I hadn't  
 11 thought about that specifically, but I  
 12 certainly think, backing up a step, in terms  
 13 of generality they certainly should have  
 14 investigated the Costco matter independently,  
 15 whether that involved contacting Costco,  
 16 which was certainly one possibility since  
 17 Lehman Brothers appeared to have some entree  
 18 to Costco, I don't recall specifically what  
 19 that was, but contacting Costco directly  
 20 seemed to be one choice, contacting an  
 21 industry expert with knowledge of those types  
 22 of things to conduct an independent analysis  
 23 is another choice; there may have been  
 24 different ways to accomplish that. I haven't  
 25 thought further about how that should have

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1 effect.  
 2 Q. You take from Ms. Pulido-Crowe's  
 3 testimony that Francis was nothing more than a  
 4 figurehead?  
 5 A. In very shorthand form, yes --  
 6 Q. Do you have any other basis for  
 7 that?  
 8 MR. LEWIS: Please don't cut him  
 9 off.  
 10 BY MR. GLUCKOW:  
 11 Q. I'm sorry.  
 12 A. She described, as I recall, his  
 13 attendance at certain meetings, his fronting the  
 14 presentations to the commitment committee, and what I  
 15 would describe as more of a political role in the  
 16 process than a substantive role in an investigatory  
 17 way or anything of that nature.  
 18 Q. Any other basis for that statement?  
 19 MR. LEWIS: Objection to form and  
 20 foundation.  
 21 THE WITNESS: Only that in  
 22 discussing the functions that they were  
 23 performing, in the deposition I don't recall  
 24 either Pulido-Crowe or Walravens referring to  
 25 Francis having done anything in the process

1 been done, but something should have been  
 2 done along those lines to pursue that issue.  
 3 BY MR. GLUCKOW:  
 4 Q. As you sit here today, what is it  
 5 that you think needed to be done to have what, in your  
 6 view, would have been a reasonable investigation?  
 7 MR. LEWIS: Objection to form and  
 8 foundation, compound, and we've been over a  
 9 lot of this already.  
 10 Go ahead.  
 11 THE WITNESS: Again, that's an area  
 12 I have not been asked for specific opinions  
 13 on to this time. I have produced the opinion  
 14 so far that Mr. Necarsulmer has not  
 15 demonstrated that a reasonable and adequate  
 16 investigation was performed, which is what I  
 17 was asked to opine to in this area.  
 18 Having conducted some analysis of  
 19 this and reviewed the information we  
 20 discussed so far today, I have reached some  
 21 opinions about what I know so far appeared to  
 22 have been done or not done, and that's the  
 23 basis on which I am answering your questions  
 24 now.  
 25 In terms of what should have been

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1	done to conduct a reasonable investigation,	1	need to.
2	at a minimum, the project should have been	2	All I'm saying is you had as much
3	staffed sufficiently to ensure that somebody	3	time as you needed with Mr. Necarsulmer,
4	would take the responsibility to conduct an	4	right, and they had as much time as they
5	independent investigation of potential	5	needed upstairs today with Mr. James.
6	problem areas as they arose. The one I'm	6	MR. LEWIS: Right, but nobody has
7	concerned about, obviously, is gray	7	gone past the seven-hour limit, as far as I'm
8	marketing.	8	aware of, and that's established by the
9	When that appeared to be an issue,	9	rules. I'm not trying to be difficult about
10	based on the information that clubs were	10	it, but you don't get to go on until ten
11	appearing in Costco, the underwriters should	11	o'clock because you have questions until ten
12	have conducted an independent investigation	12	o'clock; you have your limit. I'm trying to
13	as to what that meant, what effect it was	13	be flexible on it, but if you're not going to
14	having on the retailers and distributors,	14	be flexible with me and find a way to meet
15	what effect it was having on customers, how	15	some reasonable limit at this time of day,
16	Costco was obtaining the clubs, whether it	16	then we're going to have to cut it off.
17	was likely to continue, what effect gray	17	MR. GLUCKOW: I certainly intend to
18	marketing had on companies that suffered from	18	be reasonable but I certainly also intend to
19	it.	19	complete the examination, so hopefully that
20	The red flag, I believe, had been	20	will be something we can both live with.
21	raised once the underwriters obtained	21	MR. LEWIS: It's got to be pretty
22	knowledge of the clubs' appearance in Costco.	22	soon.
23	The issue had been raised by appearance in	23	BY MR. GLUCKOW:
24	Callaway's 10-K and industry knowledge was	24	Q. I think I was asking you was there
25	available, according to Mr. Magnussen, about	25	anything else before we go back through these items.
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1	gray marketing, so it doesn't seem as though	1	A. I have not compared the outline of
2	it should have been all that difficult to get	2	Mr. Necarsulmer in here with the paragraphs that I had
3	into the industry and get information about	3	submitted outlining an underwriter's responsibilities
4	that and, thereafter, determine what to do	4	in the context of due diligence to see how his
5	about it.	5	opinions stack up against those.
6	BY MR. GLUCKOW:	6	(Mr. Bessette leaves the
7	Q. Anything else, because we're going	7	deposition.)
8	to go through each of these, but I want to know if	8	(Mr. Collins enters the deposition.)
9	there's anything else before we do?	9	THE WITNESS: Without having done
10	MR. LEWIS: We're at five of six.	10	that, I think the additional red flag that
11	We started nine hours ago, which is okay.	11	exists in these materials, to those I've
12	We're all tired. The witness, I'm sure --	12	already discussed, would be in Paragraph 6,
13	I'm tired, at least. Maybe everybody else	13	which --
14	isn't, but I'm very tired. The witness is	14	BY MR. GLUCKOW:
15	tired. We're very close, if not past, the	15	Q. I'm sorry, Paragraph 6 of?
16	seven-hour limit. I want to give you some	16	A. I'm sorry, Page 3 of
17	leeway, but we're going to have to cut off at	17	Mr. Necarsulmer, which refers to the commitment
18	some point.	18	committee memo, I believe, which did have a line in it
19	MR. GLUCKOW: If you're tired, the	19	referring to the importance of maintaining margins, I
20	witness is tired, I'm happy to pick this up	20	believe it was, at Adams and how those could not be
21	on Monday, but here's my point --	21	allowed to deteriorate or something to that effect,
22	MR. LEWIS: We're not picking up	22	so, again, that identifies someone was aware of the
23	Monday.	23	general issue of margin maintenance but not in the
24	MR. GLUCKOW: That's fine, we'll	24	specific wording of gray marketing.
25	just keep going; I'm not suggesting that we	25	Having said that, I think the answer

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1 I gave you previously probably covers at least the  
 2 major areas of where I would be today on this issue  
 3 since you raised it and asked me.

4 Q. Can you think of any other areas? I  
 5 don't want you to say that they're just the major  
 6 ones. Can you think of any other areas as of today  
 7 that you think would have required follow-through --

8 MR. LEWIS: Objection.

9 BY MR. GLUCKOW:

10 Q. -- in your opinion?

11 MR. LEWIS: Form, foundation, scope  
 12 of the opinion.

13 THE WITNESS: Again, I haven't been  
 14 asked to form an opinion on that prior to  
 15 this time and I've been giving you the  
 16 thoughts I have in this area in response to  
 17 your questions, and I think I hit on the  
 18 major area, particularly with respect to gray  
 19 marketing, and that being the lack of  
 20 independent investigation by the underwriters  
 21 of the issue and the willingness to accept  
 22 Mr. Adams' assertion he would take care of  
 23 the Costco problem and essentially leaving it  
 24 at that, so I think that probably covers it  
 25 with respect to that issue.

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1 mentioned in the prospectus, but that's all it says in  
 2 the prospectus, is basically that one line.

3 Q. Are you aware of Mr. Frazier's  
 4 opinion, Professor Frazier's opinion, in this case?

5 A. I don't believe so.

6 Q. You haven't seen the transcript of  
 7 his deposition from earlier this week?

8 A. I have not.

9 MR. LEWIS: In five minutes, I'm  
 10 going to ask the court reporter to do a  
 11 calculation of time for us so we can reach  
 12 some conclusion here.

13 BY MR. GLUCKOW:

14 Q. I think we've confirmed this, but if  
 15 you turn to Paragraph 25 on Page 23 of your rebuttal  
 16 report, in the last sentence you state in your opinion  
 17 the expert report of Mr. Necarsulmer does not meet the  
 18 underwriters' burden to demonstrate that the  
 19 investigation and/or resulting disclosures were  
 20 reasonable and adequate, correct?

21 A. Right.

22 Q. You're not offering an opinion in  
 23 this report, I think we've established, dealing with  
 24 whether in your opinion the underwriters'  
 25 investigation was reasonable, correct; you have not

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1 I have not sat here and attempted to  
 2 go beyond that and think about every other  
 3 area they may have been deficient in their  
 4 work, and have not been asked to do that to  
 5 this point, but I think the major issue with  
 6 respect to gray marketing would be covered by  
 7 that topic.

8 BY MR. GLUCKOW:

9 Q. Putting aside the gray market issue  
 10 or the Costco issue, however you want to phrase it,  
 11 you're not offering any opinion that the underwriters'  
 12 investigation was less than reasonable in any other  
 13 way, are you? I've never heard you suggest otherwise.

14 MR. LEWIS: Objection to form,  
 15 foundation, scope.

16 BY MR. GLUCKOW:

17 Q. Am I correct?

18 A. I haven't been asked that question.  
 19 I haven't been asked to focus on areas other than gray  
 20 marketing, so I couldn't answer that in that sense.

21 Q. The margins issue you mentioned  
 22 before with respect to Paragraph 6 is reflected in the  
 23 prospectus, correct?

24 A. Again, in a very general way, the  
 25 issue of maintenance of sales price margin is

1 offered a written opinion on that question?

2 MR. LEWIS: Objection to form.  
 3 THE WITNESS: That's correct.

4 BY MR. GLUCKOW:

5 Q. What are your qualifications to  
 6 opine on whether Mr. Necarsulmer has met the  
 7 underwriters' burden?

8 MR. LEWIS: Objection to form,  
 9 foundation; calls for legal conclusion.

10 THE WITNESS: I think we've  
 11 discussed those earlier today at some length.

12 BY MR. GLUCKOW:

13 Q. You have nothing to add to the  
 14 qualifications that enable you to offer that opinion  
 15 other than what we talked about earlier?

16 MR. LEWIS: Objection to form,  
 17 foundation, legal conclusion.

18 THE WITNESS: Yeah, I think that's  
 19 probably correct in terms of background,  
 20 education, work experience, and that sort of  
 21 thing.

22 Having said that and having reviewed  
 23 the information that I've reviewed that we've  
 24 discussed, having reviewed Mr. Necarsulmer's  
 25 report, it's a fairly easy matter in the

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1 BY MR. GLUCKOW:

2 Q. Do you know whether there were any  
 3 discussions between the underwriters and Adams'  
 4 management concerning gray marketing or Costco in  
 5 connection with the Adams' press release in early June  
 6 concerning the Costco issue?

7 MR. LEWIS: Object to the form.

8 THE WITNESS: Again, I recall that  
 9 there was some discussion about that in  
 10 connection with the Costco issue as presented  
 11 in the press release and limited to that as  
 12 opposed to the overall problem of gray  
 13 marketing and sale of clubs through Costco  
 14 and the implications that that had for the  
 15 company.

16 BY MR. GLUCKOW:

17 Q. What's the basis for your last  
 18 answer?

19 A. My understanding of the conversation  
 20 -- the conversations that occurred around the Hoffman  
 21 letter with respect to addressing the SEC's inquiry  
 22 about whether the issue discussed in the Hoffman  
 23 letter had been investigated or examined by the  
 24 company according to materiality standard.

25 MR. LEWIS: We have to shut it down

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1 keep asking someone for views they have, it's  
 2 not going to be surprising if they have  
 3 views.

4 MR. GLUCKOW: If you were willing to  
 5 tell me he isn't going to offer any opinions  
 6 concerning the underwriters' due diligence  
 7 beyond that which is contained in his written  
 8 reports, I told you a long time ago this  
 9 could have been completed much sooner, but  
 10 you won't give me that, and because you won't  
 11 give me that, I need to know what opinions he  
 12 has formed on that topic.

13 MR. LEWIS: You still haven't  
 14 answered Todd's question of how much longer  
 15 do you have to go. We're talking about  
 16 travel arrangements at this point for people,  
 17 including the witness.

18 MR. GLUCKOW: Quite honestly, based  
 19 on this last exchange, I think I have  
 20 probably another half an hour, at least.

21 MR. COLLINS: Why don't you proceed  
 22 with your questioning.

23 BY MR. LEWIS:

24 Q. Mr. Miller, aside from the opinions  
 25 that have been expressed in your various reports about

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1 at this point. We're just at the time  
 2 lengths -- we're way past. This was  
 3 scheduled in this fashion at your guy's  
 4 request. There was no anticipation of going  
 5 after six o'clock on a Friday afternoon. We  
 6 all have different plans and travel plans.

7 I have one question, possibly the  
 8 famous one question, for Mr. Miller to get on  
 9 the record before we terminate.

10 MR. GLUCKOW: I'm going to object to  
 11 your shutting down the deposition because I  
 12 have not finished my examination, and I will  
 13 reserve all my rights.

14 MR. COLLINS: Any idea how much  
 15 more? We've been through this before and  
 16 asked you that question.

17 MR. GLUCKOW: Part of the problem is  
 18 every time I ask more questions, I'm getting  
 19 new opinions from the witness that are not  
 20 reflected in his written opinions in the  
 21 case.

22 MR. LEWIS: Because you're asking  
 23 him for them, you're asking what opinions he  
 24 may have formed aside of the opinions that he  
 25 has been engaged to express, and so if you

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1 underwriters' due diligence, are there any other  
 2 opinions that you have formed and believe you may  
 3 express in the litigation on the subject of due  
 4 diligence?

5 A. If asked about the topic of due  
 6 diligence with respect to other parties besides the  
 7 underwriters, I would offer the same sort of opinion  
 8 with respect to the conduct of due diligence by other  
 9 parties being signatories or defendants in this matter  
 10 as well.

11 Q. Can you describe briefly what the  
 12 basis of that opinion would rest upon?

13 A. Basically, my understanding that the  
 14 opportunity afforded for the due diligence defense is  
 15 the same, or essentially the same, under Section 11,  
 16 that is, that a party can establish that he performed  
 17 a reasonable and adequate investigation and thereafter  
 18 had a reasonable basis to believe that the prospectus  
 19 was not misleading, and that that would be the primary  
 20 basis, that is, that the same essential standard  
 21 applies and the same result occurred here.

22 Q. Have you formed any views,  
 23 preliminary or otherwise, as to whether the officer  
 24 and director defendants in this litigation are  
 25 entitled to avail themselves of the due diligence